In the Supreme Court of the United States

OCTOBER TERM 1940.

Nos. 44 and 45.

CHARLES PEYTON WEST,
MAURICE JOHN WEST,
Petitioners,

vs.

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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Respondent's brief contains certain misleading assertions and half-truths which petitioners feel obliged to challenge by means of this Reply Brief.

1. *On page 4* of Respondent's Brief, it is asserted that the second transfer in 1929—the cancellation of the West certificate—was not "negligent or wrongful," because, if respondent had refused to issue a new certificate to the bona fide purchaser, it "would have been liable to the assignee [bona fide purchaser] under the Uniform Stock Transfer Act."

To support this statement, *Finance Co. v. Booth,* 111 O. S. 361, is cited, improperly, as shown below.

Then follows this *non sequitur* assertion:

"* * * therefore, the second transfer was not the proximate cause of any injury to the plaintiffs."

In support of this assertion Judge Lurton's opinion in *Smith v. Nashville & Decatur R. Co.*, 91 Tenn. 221, is cited, also erroneously as shown below.

The proposition that respondent would have been liable to the bona fide purchaser, if it had refused to issue a new certificate in 1929, is, of course, correct.

The fallacy lies in the claim that therefore respondent owed no duty to protect the petitioners' interests. The duty to the petitioners and the duty to the bona fide purchaser are separate and distinct duties, not correlative duties.

And it is to be noted that the duty to the bona fide purchaser arose directly from the wrongful issuance of the certificate in 1927 in the life tenant's own name. If that certificate had been properly issued, there would have been no bona fide purchaser.

As pointed out in petitioners' principal brief, respondent owed the petitioners two duties:

(1) To evidence their remainder interest in the certificate issued to the life tenant in 1927; and

(2) To protect the remainder interest in 1929 when the certificate of 1927 was presented by the bona fide purchaser for cancellation.

We are not concerned in this case with any duty owing to the bona fide purchaser. We are concerned only with the duties owing to petitioners.

Especially is this so where the innocent purchaser became such by respondent's breach of duty to petitioners. Its duty to the innocent purchaser arose from its own wrong. Therefore, respondent cannot exculpate itself of its liability to petitioners on the ground of its liability to the innocent purchaser.

In *Finance Co. v. Booth*, the court decides one question only—what the Ohio measure of damages is, where a corporation refuses on demand to issue a new certificate to a bona fide purchaser. See page 365 of the opinion.

Smith v. Nashville & D. R. Co. is cited as holding that the transfer to the bona fide purchaser in 1929 and the consequent destruction of the West certificate are not the proximate cause of the loss to the petitioners.

This is definitely not what that case holds. The owner of corporate stock left a will bequeathing it to his daughter for life, but not naming an executor in the will. An administrator with the will annexed was appointed, who administered the estate and distributed the stock, endorsing the certificate which was in the name of the deceased as "administrator" without showing in the endorsement that he was administrator "with the will annexed." The corporation had no knowledge of a will and, assuming she took the stock as heir, issued the new certificate in the daughter's name without any limitation. The daughter sold the stock. In an action by the remaindermen against the corporation, Justice Lurton held the corporation was not liable because it had no knowledge of the will and was under no duty to inquire whether there was a will from the mere fact that an administrator was making the distribution. The court recognizes the rules petitioners here urge. There is nothing in the case justifying respondent's interpretation of it.

Baker v. Atlantic Coast Line Railroad Co. (1917) 173 N. C. 365 holds the proximate cause of the loss is the second transfer and, in commenting on the Tennessee case, finds it is in accord with general law.

2. *On pages 5 to 10* of Respondent's Brief, it is asserted that some peculiar rule of law obtains in Ohio as to the rights of life tenants, and, not without some effrontery, it is declared on page 8 that the life tenant in the case at bar, under the law of Ohio, was entitled to have the stock issued in her name without evidencing any limitations.

But, in the same breath, on the same page, it is conceded that this is so only, "in the absence of restriction in the will, or objection by the remainderman or the Court." This concession necessarily refutes its argument. For the

will here bequeaths only a life estate and expressly provides that the life tenant cannot sell without the consent of the remainderman.

However, no such sporadic rule of law applicable to life estates as respondent professes to find in the Ohio cases, in fact exists. The law of Ohio is fully in accord with the law generally:

(1) A life tenant is entitled to possession because he has the use of the property, and in the case of stocks, the life tenant is the one who votes the stocks. This is the universal rule. See *Posegate v. South* (1889) 46 O. S. 391, at p. 395.

(2) And it is the further universal rule that the issuer of registered securities, e.g. stocks and bonds, has a duty to protect the rights of future interest holders whenever it has actual or constructive notice of such rights. *Allen v. Insurance Co.* (1894) 10 D. Repr. 204 (Affirmed, without opinion, 52 O. S. 622), and other cases cited on pp. 36 to 38 of principal brief.

3. *On page 7* of its brief, respondent reiterates the contention that the probate court, upon approving distribution in kind in 1927, expressly directed distribution to Mrs. West without limitation.

There are two conclusive answers to this:

(1) The court expressly found that Mrs. West was bequeathed only a life estate (R. 68); and

(2) Even if the probate court had made an explicit order that Mrs. West was the absolute owner of the stock and the new certificate should therefore be issued in her name without limitation, the respondent would still not be relieved of the duty to protect the remaindermen, because the probate court of Ohio has no power to fix the rights of distributees.

In addition to *Swearingen v. Morris*, 14 O. S. 424, and *Armstrong v. Grandin*, 39 O. S. 368, which two cases, re-

spondent admits on page 9 of its brief, hold that the probate court has no such power, this federal case may also be cited as declaring this doctrine:

Brown v. Routzahn (1931) 59 Fed. (2d) 329, at 333.

4. *On page 8* of Respondent's Brief the question is asked, Why is a remainderman of stocks to be given a protection by the issuer of the stocks, which is not enjoyed as to cash, chattels and unregistered securities?

These are sufficient answers to that query:

(1) As shown on pages 36 to 38 of the petitioners' principal brief, a corporation is trustee of its shares, and as such trustee owes a duty to all persons who are known to have rights in its shares to make lawful transfers to them, whether such rights are legal or equitable, in possession or expectant, vested or contingent. This is a fundamental rule.

(2) A second answer is that a like protection is indeed afforded in respect to cash, chattels and unregistered securities. A third person who knowingly deals with a life tenant, trustee, bailee, or other limited holder of any species of property, owes a duty to the expectant holder; he is charged with inquiry as to the limitations on the powers sought to be exercised by the limited holder; such third person deals with the limited holder at his own peril. This is also a fundamental rule. For example, a bank cannot surrender funds to a trustee who is known to the bank to be withdrawing the funds in breach of trust.

Restatement of Law of Trusts, §324.

(3) It is argued *on page 5* of Respondent's Brief that if the remainderman does not avail himself of Section 10509-185, General Code of Ohio, which section is quoted on that page, then he must suffer the consequences; and it is argued that that section contemplates that stock may be issued to a life tenant without limitation, and the remainderman has the responsibility to require security. But, may

not the precise contrary be true? In view of the fundamental rule that a corporation which has notice of an expectant interest must protect such interest, does not the remainderman have the right to assume that the corporation will discharge its legal duty, and, as to stocks, he need not see to the security he might require as to cash, chattels and unregistered securities? For it is also an elementary rule of law, that in all cases where the future interest is shown to be in peril, equity will afford the holder protection. If no such showing is made, the protection is not afforded. And the statute above referred to is merely declaratory of the means available to a remainderman when he requires additional protection irrespective of the kind of property. See 21 *C. J.* pp. 965 to 968.

5. *On page 13* of Respondent's Brief, it is asserted that petitioners have not hitherto claimed the instant action is *ex contractu*. Petitioners are not aware of any rule of this Court prohibiting tenable arguments, even if not advanced before.

However that may be, there has been no earlier occasion in the Federal Courts to discuss the statute of limitations, because the Ohio Court of Appeals held no cause of action accrued until demand had been refused; and no statute of limitations can run in any case until the cause of action accrues.

6. *On page 14* of Respondent's Brief, it is contended:

(1) That trover can be brought only by one who has, or is entitled to, possession; and

(2) That the Kentucky cases so hold.

The first assertion is questionable, and the second assertion is certainly entirely erroneous.

(1) The cases cited on pages 29 to 36 of petitioners' principal brief show that all rights in the West stock accelerated to petitioners when the life tenant sold the stock; and that therefore when respondent cancelled the West

certificate in 1929, the petitioners were the absolute owners entitled to possession. See, also, *Sanborn v. Colman* (1832), 6 N. H. 14. And if possession is necessary to maintain trover, the instant action is proper.

However, assume for the sake of argument that acceleration did not occur, and assume further that the action against the corporation—not against the life tenant—for restoration of the stock and incidental rights is an *ex delicto* action, though both assumptions are contrary to settled law, nevertheless Respondent's contention may be erroneous.

Under the technicalities of common law pleading, possession, or the right to possession, appears to have been essential to maintain trover.

But common law pleading niceties are repugnant to the liberalities of code pleading, which prevails in Massachusetts and Ohio, the two states with which we are concerned.

Under the assumption above made, the petitioners, as remaindermen, are nevertheless the owners of the property subject only to a life estate, and therefore it is reasonable that conversion of the property or injury to it should be redressible by them.

In *Nash v. Lang* (1929), 268 Mass. 407, at 414, Rugg, *C.J.*, says in reference to the right of a bailor to bring an action for damages against a third person who injured the property of the bailment:

> "The general title remains in the bailor; the bailee has a special interest for the purpose of the bailment. The bailor may maintain an action against a third person for permanent injury to the chattel or for its conversion or for its replevin."

In discussing trover cases, and referring particularly to the above liberal statement in the Massachusetts case, Prof. Edward H. Warren says in 49 *H. L. R.*, p. 1104:

"It is well within the bounds of probability that the courts in other jurisdictions with statutes similar to Massachusetts statute, will approve the statement of the learned Chief Justice in *Nash v. Lang*. We submit that this makes the law more simple and more sensible than it once was. Wherever this is law, it is no longer true that in no case can an owner qualify as a plaintiff in an action for a conversion unless he can show that at the time of the conversion he had the possession or the right to immediate possession."

In *Railroad Co. v. O'Donnell* (1892), 49 O. S. 489, the question was whether the consignee of goods had to have possession, or the right to possession, to recover damages for conversion of the goods. And the court holds on page 503 of the opinion that possession is necessary only in seeking to recover the property, but not in an action for damages for its conversion, title being sufficient.

(2) The Kentucky cases cited by respondent do not hold as respondent contends. They definitely hold that the unlawful conversion of the property by a life tenant, accelerates the rights of the remaindermen, and therefore they are entitled to possession. If possession is necessary for trover, the instant action may be maintained.

7. *On p. 26* of Respondent's Brief it is said that no demand preceded the filing of the cases there cited.

The plain fact is, as disclosed by an examination of those cases, that the necessity of demand is not decided or discussed. But on p. 367 of *Baker v. Atlantic Coast Line Railroad* (1917), 173 N. C. 365, it is recited that demand was there made. In *Lowry v. Bank* (1848), 15 Fed. Cases No. 8,581, Taney's Reports, 310, Chief Justice Taney refers to the refusal of the corporation to recognize the plaintiffs' rights; there could have been no refusal without a demand.

8. *On p. 29* of Respondent's brief it is strenuously argued that the Ohio Court of Appeals, in holding demand prerequisite to suit, misapplied well-settled Ohio law.

The argument is that demand was not essential, the action sounds in tort, and the four year statute of limitations bars it.

Petitioners attempt to answer this argument fully in their principal brief, as follows:

On pp. 9 and 10, that the Ohio decision in this case on demand is *res judicata* and binding on all courts.

On pp. 11-20, that the Ohio decision in this case establishes the law of Ohio, binding on the federal courts under *Erie Railroad v. Tompkins.*

On pp. 15-20 that even if the rule is that only decisions of the highest court of the state are binding on the federal courts, the Ohio Court of Appeals is the court of last resort in the normal case and therefore its decisions bind the federal courts, especially since the Supreme Court denied review.

On p. 22 that by the decisions of the Supreme Court of Ohio in other like cases demand is held necessary.

On pp. 22-26 that the action would still not be barred because (1) it is an *ex contractu* action (p. 23), and the six year statute applies; and (2) the relation between stockholder and corporation is a fiduciary one and therefore no statute runs until the stockholder knows of the wrongful transfer (p. 26). The latter is the holding of the Supreme Court of Ohio in *Railroad Co. v. Robbins* (1880), 35 O. S. 483, at p. 502, as pointed out on p. 26 of the principal brief.

In other words, to make the defense of the statute of limitations a valid defense, it must be held:

(1) That demand was not essential.

So to hold is to set aside the doctrine of *res judicata*; and to flout the decisions of the Supreme Court of Ohio.

And it must also be held that the action sounds in tort, and is barred in four years.

To so hold is to ignore established theory that the action is *ex contractu* and the six year statute applies. On

this point, in addition to the cases cited in the principal brief, see 18 *C. J. S.* p. 1066.

(2) Or it must be held that no fiduciary relation exists between shareholder and corporation.

But all the authorities recognize such relation.

And when such relation exists no statute runs until the wrong is discovered. The *Robbins* case so holds. The court in the *Robbins* case fails to give the reason for the holding. The only possible reason is the fiduciary relation. The theory is that the corporation is to be charged with constructive fraud, or fraudulent concealment.

Yeager v. Bank (1908), 127 Ky. 751, expressly so holds. In th t case the action was barred because the remaindermen did not sue within the period of the savings clause after discovery of the wrongful transfer.

This is a general doctrine applied to fiduciary relations, as shown on p. 26 of petitioners' principal brief.

One final word about *laches.*

Nor can the action be barred by laches because the elements of laches are not present. The Circuit Court of Appeals misapprehended the law of laches. It declares that on account of the delay in making demand petitioners are barred because respondent "may well have lost its power to protect itself by action against the life tenant," and declares further that the life tenant was "the principal tort feasor." (R. 142.)

Now, the life tenant and the corporation are equally wrongdoers. *Lowry v. Bank, supra,* 8th syllabus, where it is said:

> "* * * the bank by permitting the transfer enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction."

There is not a principal and a secondary wrongdoer.

The rule that one wrongdoer cannot obtain contribution or indemnity from another is grounded in the firmest considerations of policy.

Royal Indemnity Co. v. Becker (1930), 122 O. S. 582, 173 N. E. 194, 75 A. L. R. 481;

Union Stockyards Co. v. Railroad (1905), 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525.

The Circuit Court of Appeals is therefore in error in applying the doctrine of laches for two reasons:

(1) No actual, as distinguished from fictional, prejudice to respondent appears in the record; and

(2) No action for contribution or indemnity is possible because respondent is no less a wrongdoer than the life tenant. By its breach of trust it enabled the life tenant to commit a breach of her trust, and it "is as fully liable as" the life tenant. The usual rule applies.

Respectfully submitted,

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